

EXHIBIT A

Hearing Before Hon. Alvin K. Hellerstein 3/22/2011 2:41:00 PM

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1 UNITED STATES DISTRICT COURT
 1 SOUTHERN DISTRICT OF NEW YORK
 2 -----X
 2 IN RE WORLD TRADE CENTER
 3 DISASTER SITE LITIGATION
 3 -----X 21 MC 100(AKH)
 4 IN RE LOWER MANHATTAN DISASTER 21 MC 102(AKH)
 4 SITE LITIGATION 21 MC 103(AKH)
 5 -----X
 5 IN RE COMBINED WORLD TRADE CENTER
 6 DISASTER SITE AND LOWER MANHATTAN
 6 DISASTER SITE LITIGATION
 7 -----X
 7 New York, N.Y.
 8
 8 March 22, 2011
 9 2:41 p.m.
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 10 Before:
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 11 HON. ALVIN K. HELLERSTEIN,
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 12 District Judge
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1 THE COURT: Be seated, everyone. Good afternoon.
 2 ALL COUNSEL: Good afternoon, your Honor.
 3 THE COURT: As customary, I've distributed on the Web
 4 site, and by e-mail to liaison counsel, an agenda for today's
 5 discussion and, to fill out one part of the discussion, a
 6 suggested calendar leading to trials. And, again, as our
 7 custom has developed, anyone who wants to add or modify any of
 8 the items will be welcome to do so. So on the agenda I have
 9 outlined seven major points, and I'll proceed in the order that
 10 I set out.
 11 First is what to do with the opt-out cases, those
 12 people who have decided they did not wish to enter into the
 13 settlement process agreement, presumably because they wanted to
 14 have their cases tried, or perhaps there are other reasons why
 15 they thought that the proposed settlements as far as they were
 16 concerned were not adequate.
 17 I've heard two sets of comments with regard to this
 18 group of people. One is we should see what the administration
 19 of the Zadroga Bill will promise, and wait and let these people
 20 have another chance, in effect, to decide whether to enter that
 21 kind of a settlement, or to continue on the Court's calendar
 22 towards trial; and the second would be to set up a schedule
 23 contemplating trial of those cases.
 24 Counsel -- and I thank Mr. Napoli and Mr. Papain and
 25 their colleagues, and Mr. Tyrrell, Mr. Hopkins and Ms. Warner

1 and Mr. Beester for reviewing the list of cases, and we have
 2 this list and I'll put this on the web page, the list of
 3 opt-out plaintiffs. And I have been looking at them. There
 4 are 85 in number. The earliest case that's been filed is a
 5 case brought by Alexandros Anastassatos in 2003, 03 Civil
 6 08812. That client is represented by the firm of Brecher
 7 Fishman.
 8 That's the only 2003 cases I have noted. There are a
 9 few cases going back to 2004 and so on. And I recognize some
 10 of the names on these lists because they have been active in
 11 the various meetings that we have had since the settlement
 12 process agreement was agreed to and approved.
 13 So that's the question, what to do with these people.
 14 I thought very hard about it. I think both counsel
 15 for the plaintiffs and for the defendants have suggested that
 16 we might wait, that let's see what the Administration comes up
 17 with. The Administration is required to propagate regulations
 18 by September. So why don't we wait until September?
 19 The problem with waiting is that we really can't have
 20 a high degree of confidence that our questions will be answered
 21 by September. Assuming that the regulations are put together,
 22 which is a large assumption, and that a special master is
 23 appointed -- I think we'll have a special master appointed, but
 24 as of now I've heard various names still being considered --
 25 there then has to be some kind of procedure by which the

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1 Now, assuming we follow this schedule -- and, as I
 2 say, it is only a suggested schedule -- the knowledge gained
 3 from what the experts will say will fit very well into the
 4 period given by the Zadroga Bill for making up one's mind.
 5 People will gain a better perspective of what confidence level
 6 they should have about going forward towards trial or taking
 7 advantage, in whatever way they can take advantage, and gain
 8 certain knowledge under the regulations promulgated under
 9 Zadroga. So I'm not sure and I think, to the contrary,
 10 discovery will advance the state of knowledge and quality of
 11 decision making on the part of this group of 85, this group
 12 that I'm concerned about.

13 That brings us to the issues on Daubert, which will
 14 also be within this period, and I would contemplate that by the
 15 end of July, with all going well -- which is a very large
 16 assumption -- everyone will have the benefit of my decision on
 17 the Daubert issues.

18 In short, there is a lot of advantage in going ahead.
 19 The major disadvantages are expense and inconvenience; those
 20 are very important disadvantage considerations. But the
 21 considerations of advancing towards the ultimate resolution,
 22 gaining knowledge that could help either this patient with
 23 Zadroga or moving forward to trial, then that consideration is
 24 substantially well advanced, and we avoid that inertia that I
 25 fear of a long and indefinite delay without doing anything.

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1 taken depositions.

2 MR. TYRRELL: Right.

3 THE COURT: But, really, what you are missing,
 4 practically speaking, is knowledge about the particular
 5 plaintiffs.

6 MR. TYRRELL: Absolutely. And that's where I am
 7 starting. And that's what we here, and I think everybody
 8 knows, we call CMO 10.

9 And if I can be very, very candid about a very
 10 important point? When my client agreed to pay more than \$600
 11 million, an important part of what it bargained for, and the
 12 plaintiffs and defendants agreed upon, were what we called then
 13 long fine orders, what became CMO 10 that your Honor entered.
 14 But it really was an attempt to accomplish what your Honor
 15 worked at from the beginning of the litigation, which was
 16 providing details so that we know where people worked, exactly
 17 what their medical conditions were, that we had medical
 18 records, that we had an up-front affidavit at least saying that
 19 there was plausible connection between what they claimed to
 20 have and the events of 9/11, etc. It's all packaged in CMO 10.

21 The big problem -- and from our clients' perspective,
 22 we paid dearly for that. Your Honor was burdened a lot with
 23 how to do it. You remember we started out doing it in one way.
 24 We then converted it, in discussions with your Honor, to
 25 pleadings. We then became concerned that the pleadings might

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1 I think I'm persuaded that we should go ahead.

2 Mr. Tyrrell.

3 MR. TYRRELL: Your Honor, you know we disagree with
 4 the bottom line, but let me go to the scheduling and sort of
 5 talk about things --

6 THE COURT: This is for discussion, Mr. Tyrrell.

7 MR. TYRRELL: This is just discussion, yes, your
 8 Honor.

9 THE COURT: It is an aggressive schedule, as the
 10 previous schedule was aggressive, but I did it out of my own
 11 head. I don't know the practicalities that are implicit in
 12 having to do these things within your law firms, and I need a
 13 lot of input and advice to really fix a schedule that all of us
 14 can live under.

15 MR. TYRRELL: Your Honor, if I can sort of start here?
 16 The question now is let's assume we are going ahead. The issue
 17 that, I guess, is the first step is where do we start when we
 18 go ahead. And that is framed by a few things that I think are
 19 worth noting.

20 The first is that we have none of the benefits of all
 21 the work that we did on the 60.

22 THE COURT: I'm sorry. None of the benefits?

23 MR. TYRRELL: We have none of the detailed discovery
 24 available that we did on the 60 --

25 THE COURT: They are all gone because you have not

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1 run afoul of some Supreme Court decision, so you asked us to go
 2 back and still do it but put it together in CMO 10.

3 So although you are going to talk about CMO 10 later,
 4 I suggest to you it is the things that CMO 10 requires that you
 5 would have to start off with --

6 THE COURT: You wanted in CMO 10, and I wanted since
 7 the beginning of the case, reliable information on just the
 8 points you have mentioned. And that was the single purpose for
 9 the discovery that was worked out between the special masters
 10 and you and plaintiffs' counsel. And it seems to me we have
 11 that information.

12 What we don't have are experts

13 MR. TYRRELL: No. That's the problem. That's what I
 14 wanted to say to you. Because now you have to look at it as to
 15 whether you have it and to what degree as to the 85 opt outs.
 16 So although we only focused on this today, and I don't have all
 17 the details, we went back to our team before court and got what
 18 the computer can tell us. And here's what we have.

19 As to 21 of the opt outs in the 100 case, so
 20 25 percent of them, eight of them have no TCDI database
 21 response whatsoever.

22 THE COURT: I will dismiss the cases for failure on
 23 discovery issues.

24 MR. TYRRELL: 17 have not --

25 THE COURT: As you know, when that has been brought to

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1 my attention during the course of discovery, the prompt result
 2 was an order dismissing those cases.
 3 Why wasn't I told about that when that happened?
 4 MR. TYRRELL: The answer is because when we had 11,000
 5 cases, basically there were a bunch of holes and we were
 6 concentrating on 60.
 7 THE COURT: Well, there were 2,000 cases in each
 8 tranche.
 9 MR. TYRRELL: Right.
 10 THE COURT: And you have identified a number of them,
 11 and I dismissed those cases. Sometime we re-let them in when
 12 discovery was a little bit slow. But if there was no
 13 discovery, we would not have progressed with their cases; they
 14 would have been dismissed instantly.
 15 MR. TYRRELL: And so if you remember --
 16 THE COURT: I still could do it.
 17 MR. TYRRELL: Right.
 18 If you remember the way we structured the tranches, we
 19 never really got to the people who filed late and never got put
 20 into a tranche; so they fell through a crack in your orders.
 21 I'm not saying these are; I haven't had enough time to look at
 22 it. But in terms of your thinking through, are we ready for
 23 experts, can the special masters and we make an intelligent
 24 choice out of the 85 cases as to what would be appropriate to
 25 tee up for early trial, I suggest to you, unfortunately, we are

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1 of ten of the cases that are ready. People who have not made
 2 their cases ready don't deserve to be selected.
 3 MR. TYRRELL: Let's assume we pick the ten best. I am
 4 suggesting to you, based on the work that we have done, that in
 5 the absence of giving us time as to (a) it's hard to pick which
 6 ten are best, but we don't have the medical records to be able
 7 to --
 8 THE COURT: I will give you a suggestion. If you find
 9 that there are not ten good cases, we'll pick five. If you
 10 find that there are not five good cases, we will pick three.
 11 And if you find that there are no good cases, none will be
 12 advanced and we'll find out some other appropriate remedy.
 13 MR. TYRRELL: Your Honor, I feel that is a Biblical
 14 story.
 15 THE COURT: I've worked these cases to be trial ready.
 16 I did that with the original group of 10,000; I will do that
 17 now with this group of 85. If they are not discharging of
 18 their discovery obligations, they do not deserve the attention
 19 of the Court and they will be dismissed. Just bring a motion.
 20 MR. TYRRELL: What I'm talking about is as to the ones
 21 that don't reach the level of being dismissed --
 22 THE COURT: Those that have satisfied their
 23 obligations.
 24 MR. TYRRELL: Right.
 25 THE COURT: We know a lot but may not know

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1 not ready.
 2 17 of the 85 have not produced any medical records
 3 whatsoever. Seven have produced no core discovery. Eight of
 4 that group have produced neither medical records nor core
 5 discovery.
 6 THE COURT: I repeat, Mr. Tyrrell, bring a motion to
 7 dismiss for failure to prosecute the case in accordance with
 8 the orders of the Court. This time the motion will be granted.
 9 The list will not be 85; it will be appreciably less.
 10 MR. TYRRELL: So let's go on to the ones who have
 11 something in the record.
 12 THE COURT: Then those people can then decide very
 13 quickly that they would rather go to Zadroga.
 14 MR. TYRRELL: Right. Where we have some in the
 15 record, let's assume it is 60, what do we have in the record?
 16 We have very, very limited information and nothing updated.
 17 So what they put into core discovery -- now they have
 18 had medical treatment, presumably, and everything over the
 19 year, the last year, which will be very relevant to what your
 20 experts have to say -- none of that has been updated.
 21 THE COURT: Mr. Tyrrell, this is a dynamic case.
 22 People's health is dynamic. We are confronted every day with
 23 people who get sick, who die, and who recover. That's inherent
 24 in the cases.
 25 And if we're picking a list again, we'll pick a list

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1 100 percent, but we may know a lot.
 2 MR. TYRRELL: That is the problem. We don't, as to
 3 the ones that are beyond dismissal, know anywhere near what we
 4 knew as to the ones that we went through and selected out of
 5 the tranches.
 6 THE COURT: It will be a short discovery period to
 7 require that to be satisfied, and we can talk about discovery,
 8 and it is appropriate for these cases. That should not hamper
 9 our being able to select ten, or some appropriate number of
 10 cases, to be advanced.
 11 MR. TYRRELL: Let's assume --
 12 THE COURT: Let's just say, as you say, there are only
 13 seven or eight that have any kind of severity about them and
 14 that the great bulk are cases which have no reportable
 15 injuries, no objective condition of injuries and are just
 16 concerned that they might get an injury later on, our work will
 17 be made a lot simpler. We don't know who they are, and that's
 18 what I need to know. I need to know who they are. I need to
 19 know what level of severity they have. And I don't know that
 20 information. I would like to know.
 21 MR. TYRRELL: Let me make two suggestions, with one
 22 observation.
 23 Your Honor is suggesting that it's really now about
 24 experts and Daubert and what have you and it might coincide
 25 with the time period and help people in connection with

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1 Zadroga. My own view is that that's probably not going to
2 happen, because before you can truly unleash experts and
3 prepare an expert report, at least from the defense
4 perspective, the first thing your expert asks you is a lot of
5 information about their medical records, a great deal of which
6 we don't have.

7 So I'm all for it, if we are going to go forward with
8 this schedule, giving us time to get it so the experts can be
9 prepared at the same time.

10 THE COURT: I'll give you this amendment. If you look
11 at the suggested calendar, we can discharge 1(i), 1(ii) and
12 1(iii) and meet again to learn about these cases, identify
13 these cases, and decide what's appropriate to be done about
14 these cases.

15 If these cases show some level of severity, if these
16 cases are the kinds of cases that suggest an appropriateness
17 toward moving them forward to earlier disposition because they
18 have been around a long time and the injuries are severe, that
19 would be one thing. If, however, these cases are
20 run-of-the-mind case, people who are concerned that one day
21 they might get sick, or they are cases where discovery
22 obligations have been indifferently satisfied and should be
23 dismissed for lack of prosecution, that is another thing.

24 Right now we have a state of too much absence of
25 knowledge to make intelligent decisions on my part. It is not

1 a Zadroga issue lack of intelligence, it is a lack of
2 intelligence to make appropriate orders given the way that you
3 and Mr. Carboy and Mr. Groner have expressed themselves.
4 Let's learn more about this. Let's go through 1(i),
5 1(ii) and 1(iii) and have a conference in the second week or so
6 of April.

7 MR. TYRRELL: Your Honor, the suggestion I was going
8 to make is the special masters did a great job of working with
9 us in screening this before we took it to your Honor, including
10 writing a report for you on various things. Maybe the right
11 thing to do, though I hate to burden them with additional work,
12 is to suggest that before we meet with you, we meet with them,
13 we lay this out, we let them get an opportunity to see and then
14 recommend to you so you have not only our arguments at the
15 conference but their input as well.

16 THE COURT: I like that.

17 Special masters, what do you think?

18 (The special masters indicated affirmatively)

19 THE COURT: Yes. We could do that.

20 Let me give you a date so that we'll have some target.

21 (Pause)

22 Excuse me.

23 (The Court conferred with the special masters)

24 THE COURT: I'm suggesting that we have our next
25 conference April 15 at 2 o'clock, which is a Friday, and that

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1 the special masters will make time for you and you'll make time
2 for the special masters in anticipation of that meeting, and we
3 will see where we go from there.

4 Is that satisfactory?

5 MR. TYRRELL: Yes, your Honor.

6 MR. GRONER: Your Honor, is it possible to make it the
7 following Tuesday or Wednesday?

8 THE COURT: No. I will be away.

9 MR. GRONER: Oh, that is Passover week.

10 THE COURT: Right. That is Passover. That is the
11 last workday I have before Passover. I am taking time off.

12 MR. TYRRELL: Your Honor, one thing in terms of moving
13 things forward. I assume that there will be no problem, if we
14 don't have them -- we have to check the record, we don't know,
15 but if we don't have them, which I think is likely, releases
16 for medical records contemporaneous with what you previously
17 ordered for the 60, that we will expeditiously be given those
18 releases for the 85 so that we may move forward and supplement.

19 THE COURT: I think so. Mr. Groner? Mr. Carboy?

20 MR. GRONER: Yes, your Honor.

21 MR. CARBOY: Yes.

22 THE COURT: Whatever court orders you need, just ask
23 for them.

24 I would suggest using court orders liberally to get
25 these records. OK.

1 MR. GRONER: Your Honor, if I may?

2 THE COURT: Yes.

3 MR. GRONER: I didn't speak about discovery that the
4 plaintiffs would choose to seek against the defendants, and I
5 think it is something we could bring up with the special
6 masters. But I would be remiss in not mentioning that it is
7 something that is obviously important to us --

8 THE COURT: Mr. Groner, this is a suggested calendar.
9 I'm sure I've not thought about many other things that you will
10 be thinking about, both sides. So the meeting on the 15th will
11 be to discuss how we go forward.

12 MR. GRONER: Fine.

13 THE COURT: We should have more information -- more
14 definite information to give us a better idea of how to go
15 forward.

16 MR. GRONER: Thank you, your Honor.

17 THE COURT: But I think we should think to go forward
18 on these cases. I think things will resolve themselves as we
19 go forward and we will preserve more flexibility and give more
20 benefits to the people involved. They will have a better idea
21 of where to go.

22 All right. Now, with regard to item 2 on the --

23 sorry, we still have item 1(iii) on the agenda.

24 There have been some comments that I received that we
25 don't need TCDI anymore. I think we very much need TCDI. That